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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 275

SWEDISH AMERICAN LINES,
Petitioner,

—against—

JOSEPH J. FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,
Respondents,

—and against—

NACIREMA OPERATING CO., INC.,
Respondent-Impleaded.

REPLY BRIEF OF PETITIONER

JAMES M. ESTABROOK,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

LENNARD K. RAMBUSCH,
Of Counsel.

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STATEMENT

Respondents have failed to meet petitioner's argument that the Third Circuit's holding is directly contrary to the criteria of liability of a shipowner for breach of the warranty of seaworthiness adopted by the Courts of Appeal for the First, Second, Fourth and Ninth Circuits. These Circuits have held that a shipowner warrants the ship as reasonably fit, not that the employees of others are always careful.

Respondents have failed to meet petitioner's argument that a shipowner cannot be held liable for negligence when, as found by the judge who heard and appraised the witnesses, a sling load is improperly made up, without the

ship's knowledge, by longshoremen in the employ of an independent contracting stevedore.

Respondents' interpretation of the authorities emphasizes the present conflict and the necessity for clarification.

Respondents have incorrectly stated that the Department of Labor Safety and Health Regulations for Longshoring, 29 C.F.R. 9, have not been heretofore introduced herein. This is probably because counsel for respondents here was not present at the trial when these regulations were thoroughly briefed and argued.

Finally, respondents have not appreciated that the issues of fact were found in favor of petitioner below. The dismissal resulted from respondents' failure to prove their case even after calling one of petitioner's witnesses.

ARGUMENT

Respondents cite a number of decisions of this Court as standing for the principle that "an improper method of loading or unloading cargo or improper use of incidental equipment might give rise to unseaworthiness" and conclude that there is no novel rule of law set out in the opinion of the Court below. In reaching this conclusion respondents have obviously ignored the clear language of the Court below to the effect that:

> "The Supreme Court has not yet spoken on the precise question as to *whether a stevedore's negligence in the use of ship's seaworthy equipment makes the ship unseaworthy* * * *" (Emphasis added) 331 F. 2d 571, 578 (set out at Petition p. 12b).

In claiming that the only question presented on the issue of unseaworthiness is a question of fact, respondents have not only overlooked that part of the opinion of the Court of Appeals quoted above but they have chosen to ignore the lead-

ing precedents in the First, Second, Fourth and Ninth Circuits which were set out in the original petition and which hold directly contrary to the Third Circuit.

This Court is no doubt aware that the question presented herein is also currently pending in a petition for this Court to take certiorari in another Third Circuit case, *Thompson* v. *Calmar Steamship Corp.*, 331 F. 2d 657, which was docketed under No. 398 on August 18, 1964. Only recently this Court seemingly approved the rule of the Second Circuit when it denied certiorari in *Spinelli* v. *Isthmian Steamship Co.*, No. 991, October 1963 term, 326 F. 2d 870, cert. denied 377 U. S. 935, rehearing denied 377 U. S. 1010. A motion for leave to file a second petition for rehearing is currently pending in the *Spinelli* case. It is interesting to note that while the longshoremen—respondents herein deny that there is any inconsistency between the Circuits, the longshoreman—petitioner in *Spinelli* based his application for a rehearing on the Third Circuit's then recent decisions in *Ferrante*, and *Thompson*, contending that with *Ferrante* and *Thompson* on the books there was clearly a conflict between the Circuits.

Even according to respondents' view of the authorities there is a present conflict among the Circuits. The general authorities cited on page 7 of the respondents' brief have not resulted in uniformity among the Circuits. *Grillea* v. *United States*, 232 F. 2d 919 (CA 2, 1956), cited on page 8 of respondent's brief, was clearly distinguished by *Billeci* v. *United States*, 298 F. 2d 703 (CA 9, 1962) and any applicability it may have had to the instant case has now been overruled by *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (CA 2, 1962), *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (CA 2, 1964) and *Massa* v. *C. A. Venezuelan Navigacion*, 332 F. 2d 779 (CA 2, 1964).

The Fourth Circuit decisions of *Edwards* v. *Steinns*, 207 F. 2d 734 (1953) and *Blankenship* v. *Ellerman's Wilson Line New York Inc.*, 265 F. 2d 455 (1959) are in conflict with respondents' interpretation of *Provenza* v. *American Export Lines*, 324 F. 2d 660 (1963).

The opinion of the Third Circuit in the instant case would make the shipowner liable for breach of the warranty of seaworthiness, a concept of liability which operates irrespective of notice, for the operational negligence of an employee of an independent contracting stevedore, despite the fact that the ship and all the equipment in use at the time of the accident was fit for its intended use. It cannot be denied that this is a question of far reaching significance in the maritime industry. Without undertaking any redefinition or providing any rational guide lines, the Court below has attempted to change the shipowner's warranty of seaworthiness to a shipowner's guarantee of careful performance by an independent contractor. It has cast aside this Court's explicit and oft repeated limitations on the obligations owed by a shipowner under the warranty:

> "The duty is absolute *but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.*" (Emphasis added) *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550 (1960)

It was the position of petitioner in the Court of Appeals, and it is petitioner's position before this Court, (see Petition, pages 8-10) that there is no evidence in the record to support the contention of respondents that the mate knew of the manner in which the sling loads were being constructed by the longshoremen. The District Judge found that at the time the mate placed the slings on the deck and before the slings were placed around the draft, the mate merely said to the hatch boss "don't make them big

slings because something might be could happen and broken." The mere presence of a mate on deck does not impose liability for negligence on a shipowner when the details of the stevedoring operation are turned over to a qualified independent contracting stevedore. *Puddu* v. *Royal Netherlands S.S. Co.*, 303 Fed. 2d 752 (2 CA, 1962), cert. denied 371 U. S. 840; *Gallagher* v. *United States Lines Co.*, 206 Fed. 2d 177 (2 CA, 1953) cert. denied 346 U. S. 897. Absent notice of an unsafe method of discharge, the mate had no duty to inquire into the method of making up an individual sling load. This was the responsibility of the stevedore not the shipowner, 29 C.F.R. 9.2(a), 9.2(b), 9.81(c), 9.82(a).

The Department of Labor Regulations (29 C.F.R. 9) were thoroughly briefed by petitioner at the trial (pp. 8-10, Swedish American Line Trial Brief) and were cited by the trial judge in his conclusions of law. The statement that these Regulations had not heretofore been involved probably resulted from the fact that respondents' counsel here was not at the trial.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated, New York, N. Y., September 4, 1964.

JAMES M. ESTABROOK,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

LENNARD K. RAMBUSCH,
Of Counsel.